Petition

81-379

NO.

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IN THE

Supreme Court of the United States

October Term, 1981

ROBERT WYLER,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

~~BRIEF AND APPENDIX FOR PETITIONER~~

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Question Presented

WHETHER a defendant's indictment, conviction and/or sentence for bail jump violates double jeopardy and due process guarantees if that offense has already been taken into consideration by the Judge in imposing sentence on said defendant in the case in which the bail jump occurred.

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IN THE

Supreme Court of the United States

October Term, 1981

ROBERT WYLER,

Petitioner,

— against —

UNITED STATES OF AMERICA,

Respondent.

BRIEF FOR PETITIONER

The petitioner Robert Wyler respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit affirming the judgment of conviction entered against the petitioner by the United States District Court for the Southern District of New York.

Opinions Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto at p. 1. No. opinion was rendered by the District Court for the Southern District of New York.

Jurisdiction

The date of the judgment of the United States Court of Appeals for the Second Circuit was June 30, 1981, which was also the date of entry. This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254(1).

Statement of the Case

Petitioner Wyler was previously indicted in this District for drug offenses in *United States* v. *Wyler*, 78 Cr. 150. When he thereafter failed to appear for trial, he was tried and convicted in absentia.

After he was re-captured on July 2, 1980, petitioner was brought before the district court, Judge Carter, for sentencing in that case on July 31, 1980.[1] At that proceeding, the government argued at length that the Judge should take the fact that petitioner had jumped bail and failed to appear at trial into consideration in imposing sentence (A029). The Judge sentenced petitioner to twenty years incarceration (A043-44).

Petitioner was thereafter indicted in this case for that bail jump. On January 9, 1981, he moved to dismiss that count on the ground that since Judge Carter had already taken this bail jump into consideration in imposing sentence in the case in which it had occurred, the present charge violated the Fifth Amendment's prohibition against double jeopardy.

The trial judge never ruled on that motion. When petitioner pleaded guilty to that charge on January 19, 1981, however, the trial judge stated that as a condition for that plea, he would review the transcript of the previous sentencing proceeding and speak to Judge Carter to determine whether the bail jump had been taken into consideration in the sentencing in that case. The Court promised that if it found this to be the case, it would not be disposed to add any consecutive time to appellant's sentence (transcript of January 19, 1981 at 8).

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[1] The transcript of the sentencing proceeding in *United States* v. *Wyler*, 78 Cr. 150 on July 31, 1980 is part of the record on appeal in this case, having been set forth in petitioner's appendix to the Second Circuit Court of Appeals at A010 *et seq.*

At the sentencing on February 11, 1981, the Judge stated that after reviewing the sentencing minutes in petitioner's earlier case and speaking to Judge Carter, he had concluded that the bail jump was taken into consideration by Judge Carter in imposing sentence in that case (transcript of February 11, 1981 at 4-5).

On the basis of that finding, defense counsel asked the Judge not to impose any sentence on the bail jump charge, since it would have an adverse effect on petitioner (Id. at 6-7). The trial judge denied that request, however, and imposed a five year sentence on that count, to run concurrently with the twenty year sentence in the previous case. He also sentenced petitioner to two year sentences on each of the two gun counts, to run consecutively with each other and with the sentence in the previous case.

The Court thereafter filed appellant's motion to dismiss with an endorsement stating that it had been "withdrawn as moot" although counsel had never withdrawn the motion.

Reasons for Granting the Writ

The Court Should Grant A Writ Of Certiorari To Determine Whether A Defendant's Indictment, Conviction and/or Sentence For Bail Jump Violates Double Jeopardy and Due Process Guarantees If That Offense Has Already Been Taken Into Consideration By The Judge Imposing Sentence On That Defendant In The Case In Which That Bail Jump Occurred.

Petitioner was originally indicted on drug charges in *United States* v. *Wyler*, 78 Cr. 150. Before trial in that case, he became a fugitive, and was consequently tried and convicted in absentia.

At the sentencing in that case, after he was recaptured, the government argued at length that the Judge should take the fact that petitioner had jumped bail into consideration in imposing sentence. Petitioner was then sentenced to twenty years incarceration.

The government thereafter indicted petitioner in this case for that bail jump. Petitioner moved to dismiss that charge on the ground that it violated his double jeopardy and due process rights. Although the Judge never decided that motion, he did state, when petitioner pleaded guilty, that he would not impose consecutive time for this charge if he determined that the Judge had taken the jump into consideration at sentencing in the case in which it had occurred.

At the sentencing proceeding in this case, the judge stated that after talking to the judge in the previous case, he had determined that the bail jump offense had been taken into consideration in the sentencing in that case. Petitioner thereupon requested that no sentence be imposed on this count. The judge denied that request, however, and sentenced petitioner to five years on this count, to run concurrently with his sentence in the previous case.

Since petitioner's bail jump had already been taken into consideration in sentencing in the case in which it occurred, his subsequent indictment, conviction and/or sentence for that offense in this case violated his rights under the due process and double jeopardy clauses of the Fifth Amendment. First, by the plain meaning of the double jeopardy clause, it prohibits an individual from being subjected to more than one trial and adjudication of guilt or innocence for the same offense:

> . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb . . .

See also *United States* v. *Jenkins*, 490 F.2d 868, (2d Cir.) affirmed, 420 U.S. 358 (1973). In *United States* v. *Hendrix*, 505 F.2d 1233 (2d Cir. 1974), the court held that a judge could not take a defendant's possible perjury at trial into consideration at sentencing unless the judge "is persuaded beyond a reasonable doubt that the defendant committed it." (Id. at 1236). Presumably, that same standard would have to be met before a judge could properly consider a defendant's bail jump during trial as a negative factor at sentencing.

By mandating the same standard of proof for such uncharged offenses as is required for conviction on charged crimes, the court was making the sentencing judge a fact-finder for those uncharged offenses, permitting him to take those offenses into consideration only after he had "convicted" the defendant by finding him guilty beyond a reasonable doubt. Since the sentencing judge in petitioner's first trial made such a judgment concerning the bail jump, at the government's behest, it was improper for the government to thereafter subject petitioner to jeopardy a second time for that offense by indicting him in the present proceeding.

Alternatively, it was improper for petitioner to be punished twice for the bail jump. The double jeopardy clause protects not only against a second trial for the same offense but also against multiple punishment for the same offense. *Whalen* v. *United States*, —U.S.—, 100 S.Ct. 1432 (1980). Here, petitioner was punished for the bail jump by having that offense taken into consideration at his sentencing in the earlier case. Thereafter, it was error for him to be punished again for that offense by the sentence which was imposed on that count in this case. Even though the sentence imposed in this proceeding was concurrent to the earlier sentence, the collateral consequences of this second sentence, particularly its effect on petitioner's eligibility for parole

(see e.g. *United States* v. *Vargas*, 615 F.2d 952 (2d Cir. 1980), violated the Fifth Amendment. Consequently, petitioner's indictment, conviction and/or sentence for the bail jump in this case should be set aside.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinions of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the ~~thirteenth~~ 30th day of June , one thousand nine hundred and eighty-one.

Present:

HON. JAMES L. OAKES,
HON. AMALYA L. KEARSE,
Circuit Judges.

HON. EDWARD D. RE,
Chief Judge, United States
Court of International Trade.

UNITED STATES OF AMERICA,
Appellee,
v.

81-1077

ROBERT WYLER,
Appellant.

ORDER

Appellant Robert Wyler appeals from a judgment of the United States District Court for the Southern District of New York, Robert J. Ward, Judge, convicting him, after a plea of guilty, on two counts of possession of a firearm by a felon and one count of bail jumping. Judge Ward sentenced Wyler to five years on the bail jumping charge, to run concurrently with the twenty-year sentence he received in the narcotics case in which he jumped bail, and two years on each of the gun counts, to run consecutively to each other and concurrently to the narcotics sentence.

In essence Wyler argues that his indictment, conviction, and sentence for bail jumping violated his rights under the double jeopardy clause of the Fifth Amendment because his bail jump had already been taken into consideration in his twenty-year sentence. To be sure, the double jeopardy clause protects an individual from being subjected to more than one trial for the same offense. For purposes of double jeopardy, however, offenses are not the "same" when each requires proof of a fact that the other does not. *See Albernaz* v. *United States*, 49 U.S.L.W. 4237 (U.S. Mar. 9, 1981). *See also Blockburger* v. *United States*, 284 U.S. 299, 304 (1932). Here, the original narcotics violations and the bail jumping violation clearly required different elements of proof and, thus, prosecution for each offense was not a violation of the double jeopardy clause.

There was also nothing wrong, despite Wyler's protestations to the contrary, with Judge Ward punishing criminal conduct that has already been "taken into consideration" in another case. Judges are encouraged to be thoroughly acquainted with the character and history of an individual before sentencing him and an individual's other criminal activity, even if there has not been a conviction, may be considered. *See, e.g., United States* v. *Seijo*, 537 F.2d 694, 700 n.7 (2d Cir. 1976), *cert. denied*, 429 U.S. 1043 (1977); *United States* v. *Hendrix*, 505 F.2d 1233, 1235 (2d Cir. 1974), *cert. denied*, 423 U.S. 897 (1975); *United States* v. *Doyle*, 348 F.2d 715, 721 (2d Cir.), *cert. denied*, 382 U.S. 843 (1965). Indeed, in *Haslam* v. *United States*, 431 F.2d 362 (9th Cir. 1970), *cert. denied*, 402 U.S. 976 (1971), a case quite similar to this one, the court held that a defendant who received the maximum sentence for interstate transporta-

tion of a stolen vehicle and thereafter was also sentenced for failure to appear for sentencing had not been tried or punished twice for the same crime.

Judgment affirmed.

HON. JAMES L. OAKES
HON. AMALYA L. KEARSE,
Circuit Judges.

HON. EDWARD D. RE,
Chief Judge, United States
Court of International Trade.